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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 EMIR TIAR and E.T. RADCLIFFE
L.L.C.,

12 Plaintiffs,

13 v.

14 THE WALT DISNEY COMPANY,
15 THUNDERBIRD FILMS INC.,
WILLIAM MORRIS ENDEAVOR
16 ENTERTAINMENT, L.L.C., RICHARD
WEITZ, DAN SIGNER and JOHN DOES
17 1-25,

18 Defendants.
19

CASE NO. CV 12-9323-GW (FFMx)

Hon. George H. Wu

**NOTICE OF MOTION AND
MOTION TO DISMISS BY
DEFENDANT DAN SIGNER;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

CTRM: 10
DATE: January 7, 2013
TIME: 8:30 a.m.

20
21 **TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:**

22 PLEASE TAKE NOTICE that on January 7, 2013, at 8:30 a.m., or as soon
23 thereafter as the matter may be heard in the above-entitled court, located at 312 N.
24 Spring Street, Los Angeles, California 90012, defendant Dan Signer ("Signer") will
25 and hereby does move the Court to dismiss Counts I, IV, VII, X and XI against him
26 pursuant to Federal Rule of Civil Procedure 12(b)(6).

27 Plaintiffs' Complaint fails to state claims against Signer upon which relief can
28 be granted, on the following grounds:

1 Plaintiffs' First Claim for copyright infringement is based on conclusory
 2 allegations of copying the unprotectible idea of a young student teacher and *scenes à*
 3 *faire* and conventions of story-telling that flow naturally from that unprotectible idea.
 4 These allegations are entirely insufficient to state a claim for copyright infringement.

5 That portion of Plaintiffs' Fourth Claim for quantum meruit that seeks recovery
 6 against Signer for alleged unjust enrichment is preempted by section 301(a) of the
 7 Copyright Act. That portion of the claim that is based on an alleged misrepresentation
 8 should be dismissed because Plaintiffs allege no misrepresentation by Signer.
 9 Accordingly, the entirety of the quantum meruit claim should be dismissed as to
 10 Signer.

11 Plaintiffs' Seventh Claim for intentional misrepresentation should be dismissed
 12 as to Signer for the same reason as the portion of the quantum meruit claim against
 13 him that is based on an alleged misrepresentation – *i.e.*, because the Complaint alleges
 14 no misrepresentation by Signer.

15 Plaintiffs' Tenth and Eleventh claims against Signer for declaratory relief and
 16 injunctive relief, respectively, should also be dismissed because Plaintiffs cannot state
 17 a plausible basis for their copyright infringement claim against Signer upon which
 18 these two claims are based.

19 Signer's counsel sent a letter to Plaintiffs' counsel on December 3, 2012,
 20 requesting a pre-filing conference of counsel pursuant to Local Rule 7-3. The letter
 21 set forth the specific claims that Signer believed were subject to dismissal and the
 22 specific grounds for the contemplated motion. The letter requested that the
 23 conference take place on or before December 5, 2012 because, if the parties failed to
 24 resolve the matter informally, Signer intended to file a motion to dismiss on December
 25 10, 2012, the deadline for the other defendants' responsive pleadings. On the morning
 26 of December 5, Plaintiffs' counsel replied with an email that stated, "We understand
 27 your position and will be opposing the motion." *See* Declaration of Louis P. Petrich
 28 (¶ 3 & Exs. A & B thereto) filed concurrently herewith.

1 This motion is based upon this Notice of Motion and Motion, the attached
2 Memorandum of Points and Authorities, the [Proposed] Order submitted concurrently
3 herewith, all of the pleadings, files, and records in this proceeding, all matters of
4 which the Court may take judicial notice, and any argument or evidence that may be
5 presented to or considered by the Court prior to its ruling.
6

7 DATED: December 10, 2012

/s/

LOUIS P. PETRICH
ROBERT S. GUTIERREZ
LEOPOLD, PETRICH & SMITH, P.C.
Attorneys for Defendant DAN SIGNER

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Emir Tiar and E.T. Radcliffe L.L.C. (collectively “Plaintiffs”) allege that defendant Dan Signer (“Signer”), and other defendants, copied from Plaintiffs’ pilot script and television show “bible” entitled *Student Teacher*. In their Complaint, Plaintiffs describe *Student Teacher* as a comedy about a middle school student who becomes the teacher of his class and whose teaching efforts are often stymied due to the actions of a school bully and pranks by other students.

Plaintiffs allege that Signer obtained access to the *Student Teacher* pilot script and television show bible through defendant Richard Weitz, an agent at defendant William Morris Endeavor, and copied from it to create the children’s television show *Mr. Young*. Plaintiffs allege that, like the *Student Teacher* pilot script and show bible, *Mr. Young* is about a student teacher. Plaintiffs allege that both works feature a school janitor, a school bully, a love interest, and advice given to the student teacher. Based on these allegations, Plaintiffs assert claims against Signer for copyright infringement (First Claim for Relief), quantum meruit (Fourth Claim for Relief), intentional misrepresentation (Seventh Claim for Relief), Declaratory Relief (Tenth Claim for Relief), and Injunctive Relief and Impoundment (Eleventh Claim for Relief).

All of Plaintiffs’ claims against Signer should be dismissed because none of the allegations in these claims are *plausibly suggestive* of a claim entitling Plaintiffs to relief against Signer.

Plaintiffs’ First Claim for copyright infringement is based on conclusory allegations that Signer copied the unprotectible idea of a young student teacher and *scenes à faire* and conventions of story-telling that flow naturally from that unprotectible idea. Such allegations are insufficient to state a claim for copyright infringement.

1 Plaintiffs' Fourth Claim for quantum meruit alleges that Signer has been
 2 unjustly enriched by his alleged unauthorized use of Plaintiffs' *Student Teacher* pilot
 3 script and show bible, and seeks to recover in quantum meruit for the alleged unjust
 4 enrichment. The quantum meruit claim also alleges that Signer obtained a benefit
 5 from Plaintiffs through misrepresentation. That portion of the quantum meruit claim
 6 that seeks recovery for alleged unjust enrichment is preempted by the Copyright Act.
 7 The portion of the claim that is based on an alleged misrepresentation should be
 8 dismissed because Plaintiffs allege no misrepresentation by Signer. Accordingly, the
 9 entirety of the quantum meruit claim should be dismissed as to Signer.

10 Plaintiffs' Seventh Claim for intentional misrepresentation should be dismissed
 11 as to Signer for the same reason as the portion of the quantum meruit claim against
 12 him that is based on an alleged misrepresentation – *i.e.*, because Plaintiffs allege no
 13 misrepresentation by Signer.

14 Plaintiffs' Tenth and Eleventh claims against Signer for declaratory relief and
 15 injunctive relief, respectively, should be dismissed because Plaintiffs cannot state a
 16 copyright infringement claim upon which these two claims are based.

17 **II. LEGAL STANDARD**

18 A motion to dismiss pursuant to Federal Rule of Civil Procedure ("F.R.C.P.")
 19 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. A claim
 20 may be dismissed if it does not allege facts sufficient to raise a right to the relief
 21 requested. A plaintiff's allegations must rise above the level of mere speculation and
 22 must be plausible on their face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-
 23 559, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Only a complaint that states a plausible
 24 claim for relief survives a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 129
 25 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009); *Wild v. NBC Universal, Inc.*, 788
 26 F.Supp.2d 1083 (C.D. Cal. 2011). While for purposes of a motion to dismiss all
 27 allegations of material fact in the complaint are taken as true, a court "is not required
 28 to accept legal conclusions in the form of factual allegations if those conclusions

cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994); *Western Mining Council v. Watt*, 643 F.2d 618, 623 (9th Cir. 1981); *Zella v. The E.W. Scripps Co.*, 529 F.Supp.2d 1124, 1127-1128 (C.D. Cal. 2007). “[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). When amendment of a complaint would be futile, dismissal should be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

III. PLAINTIFFS’ FIRST CLAIM FOR COPYRIGHT INFRINGEMENT SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAIL TO ALLEGE A PLAUSIBLE CLAIM

A. Elements Of A Claim For Copyright Infringement

To establish a prima facie case of copyright infringement, Plaintiffs must present substantial evidence that they own a copyright and that Signer actually copied original, protected expression from Plaintiffs’ work. *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 361, 1115 S.Ct. 1282, 113 L.Ed.2d 358 (1991); *Mazer v. Stein*, 347 U.S. 201, 218, 74 S.Ct. 460, 98 L.Ed. 630 (1954) (“Absent copying there can be no infringement of copyright.”); *Funky Films, Inc. v. Time Warner Entertainment Co.*, 462 F.3d 1072, 1081-82 (9th Cir. 2006); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1044, n.2 (9th Cir. 1994); 4 M. & D. Nimmer, *Nimmer On Copyright* (“Nimmer”), § 13.01 at 13-5 to -6 (2012).

B. Plaintiffs’ Copyright Infringement Allegations Against Signer

In their First Claim, Plaintiffs allege that Signer infringed Plaintiffs’ *Student Teacher* pilot script and television show bible (the so-called “Registered Works”) by “creating a derivative work of Tiar’s pilot script, copying and/or creating derivative works of the episodes in the Registered Works and copying and/or creating derivative

1 works of the characters in the Registered Works.” Cmpt., ¶ 91. Plaintiffs incorporate
2 into their copyright claim the conclusory allegations that:

- 3 (a) “Signer copied the Registered Works [and] plagiarized the original
4 content including the story line and key characters” (Cmpt., ¶ 44);
- 5 (b) “Signer’s program *Mr. Young* and/or episodes and characters within the
6 series, together and/or separately, constitute an unauthorized copying
7 and/or are an unauthorized derivative of the Registered Works” (Cmpt.,
8 ¶ 45);
- 9 (c) “The story of *Mr. Young*, where a middle-school student becomes teacher
10 of his class, is identical to the story presented in the Registered Works.
11 Exercising no independent creativity, Signer simply changed the names
12 of the characters and modified the episodes as presented in the Registered
13 Works” (Cmpt., ¶ 46).

14 Plaintiffs make the similarly conclusory allegation that “[a]ll of the elements of
15 *Student Teacher* are found in *Mr. Young* (Cmpt., ¶47) and that “[i]t is no coincidence
16 that Signer came up with an idea for a television program about a student who
17 becomes a teacher, that the school’s janitor mysteriously appears and disappears to
18 give advice to the student teacher and provide comedic value, that the student teacher
19 is menaced by a bully and other students who engage in tomfoolery, that the love
20 interest enjoys science fiction, that the student teacher’s friends, parents and love
21 interest give him advice that leads to comedic results.” Cmpt., ¶ 48.

22 As demonstrated below, these conclusory allegations of a general plot idea and
23 elements that naturally flow from that general plot are entirely insufficient to state a
24 claim for copyright infringement against Signer.

25 For purposes of this Motion only, Signer will assume that Plaintiffs own a valid
26 U.S. copyright to the *Student Teacher* pilot script and show bible. 4 *Nimmer*, § 13.01
27 [A] at 13-7 to -8. What remains to be determined is the issue of “copying” of
28 protected expression, which requires that Plaintiffs properly allege and prove two

1 distinct elements: actual copying and unlawful appropriation. 4 *Nimmer*, § 13.01[B]
 2 at 13-8 to -10.

3 **C. No Adequate Allegation Of Unlawful Appropriation (“Substantial**
 4 **Similarity Of Protected Expression”)**

5 Unlawful appropriation focuses on the legal issue of whether any alleged
 6 copying extended beyond unprotectible facts, concepts or ideas (17 U.S.C. § 102(b))
 7 to plaintiff’s protectible expression, that is “the actual concrete elements that make up
 8 the total sequence of events and the relationships between the major characters.”
 9 *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985). Neither “access” nor actual
 10 copying is relevant to an analysis of whether a defendant’s work is substantially
 11 similar to protected expression in a plaintiff’s work. 4 *Nimmer*, § 13.03[D] at 13-90
 12 to -92. Thus, even if a court assumes that a defendant had access to a plaintiff’s work,
 13 there is no infringement as a matter of law if the two works are not substantially
 14 similar. *See Funky Films*, 462 F.3d at 1075 n.1, 1081-82 (no infringement even if
 15 access is assumed); *Newton v. Diamond*, 388 F. 3d 1189, 1192-93 (9th Cir. 2004)
 16 (“even where the fact of copying is conceded, no legal consequences will follow from
 17 that fact unless the copying is substantial”); *Harter v. Disney Enterprises, Inc.*, 2012
 18 WL 2565024 (E.D. Mo. 2012) (after converting F.R.C.P.12(b)(6) motion to Rule 56
 19 motion and solely on comparing the works, court ruled that defendants’ movies did
 20 not infringe plaintiff’s story); *Campbell v. Walt Disney Co.*, 718 F.Supp.2d 1108
 21 (N.D. Cal. 2010) (granting Rule 12(b)(6) motion and dismissing claim that
 22 defendants’ movie infringed plaintiff’s script).

23 When, as in this case, non-identical works are compared, the “substantial
 24 similarity” inquiry involves a legal or policy issue: How far beyond the literal may a
 25 plaintiff’s copyright monopoly extend? *Harper House, Inc. v. Thomas Nelson, Inc.*,
 26 889 F.2d 197, 201 (9th Cir. 1989); 4 *Nimmer*, § 13.03[A] at 13-37 to -39. If a plaintiff
 27 were allowed to extend his monopoly too far, liability would be imposed for the “use”
 28 of unprotected ideas and facts – rather than protected expression – in violation of the

1 First Amendment and copyright policy. *Feist*, 499 U.S. at 344-48, 349-50; *Harper &*
 2 *Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 556, 85 L.Ed.2d 588, 105 S.Ct.
 3 2218 (1985) (the idea/expression dichotomy strikes a constitutional balance between
 4 copyright and free speech interests).

5 Because storytelling necessarily relies on the use of facts, ideas, clichés, *scenes*
 6 *à faire*, conventions of story-telling and filmmaking not original to its author, *see*
 7 *Metcalf v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002), a plaintiff's dramatic work is
 8 only protected from nearly verbatim copying of factual material or from the
 9 comprehensive non-literal copying of its "story" or "pattern," the original
 10 arrangement of characters, their relationships and the essential sequence of events.
 11 4 *Nimmer*, § 13.03[A][I][b]; *Williams v. Crichton*, 84 F.3d 581, 588-91 (2d Cir. 1996);
 12 *Berkic*, 761 F.2d at 1293-94; *Olson v. National Broadcasting Co.*, 855 F.2d 1446,
 13 1450 (9th Cir. 1988); *Shaw v. Lindheim*, 919 F.2d 1353, 1363 (9th Cir. 1990);
 14 4 *Nimmer*, § 13.03[A][1] & [2] at 13-39 to -40.1 & 13-53 to -59.

15 To determine "substantial similarity" between works that are not literally
 16 similar, the Ninth Circuit employs an "extrinsic" (*i.e.*, objective) and an "intrinsic"
 17 (*i.e.*, subjective) test, originated in *Sid & Marty Krofft Television Productions, Inc. v.*
 18 *McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) ("*Krofft*"). The extrinsic test is to
 19 be applied by a court before the trier of fact evaluates the intrinsic test. *Kouf*, 16 F.3d
 20 at 1045.

21 **D. Extrinsic Test**

22 Under the extrinsic test, the court must first "list and analyze" "specific criteria"
 23 (eight factors for literary and dramatic works) in each work on an objective basis and
 24 then compare the works with reference to those factors to determine if they are
 25 substantially similar in protected "expression." *Rice v. Fox Broadcasting Co.*, 330
 26 F.3d 1170, 1174 (9th Cir. 2003); *Krofft*, 562 F.2d at 1164; *Kouf*, 16 F.3d at 1045.
 27 "[T]his question may often be decided as a matter of law." *Krofft*, 562 F.2d at 1164;
 28 *Funky Films*, 462 F.3d at 1081-82; *Cavalier*, 297 F.3d at 824; *Kouf*, 16 F.3d at 1045;

1 *Berkic*, 761 F.2d at 1293; *See v. Durang*, 711 F.2d 141, 144 (9th Cir. 1983).

2 Application of the extrinsic test filters out claimed “similarities” in
 3 unprotectible elements, such as facts, ideas, clichés, *scenes à faire*, and conventions of
 4 story-telling and filmmaking. *Rice*, 330 F.3d at 1174-75; *Cavalier*, 297 F.3d at 823;
 5 *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994);
 6 *Kouf*, 16 F.3d at 1045; *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475-
 7 77 (9th Cir. 1992); *Berkic*, 761 F.2d at 1293; 4 *Nimmer*, § 13.03[A][1] at 13-39 to -43.

8 Affirming summary judgment dismissal of a claim that a television series
 9 infringed a script, the Ninth Circuit in *Funky Films* stated:

10 The extrinsic test focuses on “articulable similarities between
 11 the plot, themes, dialogue, mood, setting, pace, characters,
 12 and sequence of events” in the two works. [Citation omitted].

13 In applying the extrinsic test, this court “compares, not the
 14 basic plot ideas for stories, but the actual concrete elements
 15 that make up the total sequence of events and the relationships
 16 between the major characters.” [Citation omitted] (bracketed
 17 material added).

18 462 F.3d at 1077.

19 **E. Plaintiffs’ Complaint Fails To State A Plausible Claim For**
 20 **Copyright Infringement Against Signer**

21 Plaintiffs’ Complaint alleges nothing more than purported similarities that, even
 22 if they existed, constitute unprotectible ideas and/or *scenes à faire*. Plaintiffs
 23 complain that both their *Student Teacher* pilot script and show bible and Signer’s *Mr.*
 24 *Young* involve a student who becomes a teacher. Even if true, this is not plausibly
 25 suggestive of a claim entitling Plaintiffs to relief for copyright infringement because it
 26 is a mere idea that is not protectible by copyright law. 17 U.S. C. § 102(b)(“In no case
 27 does copyright protection for an original work of authorship extend to any idea
 28 . . . regardless of the form in which it is described, explained, illustrated, or embodied

1 in such work.”).

2 Nor are Plaintiffs’ allegations that both works include a janitor, a school bully, a
 3 love interest, and advice given to the student teacher plausibly suggestive of a claim
 4 for copyright infringement. Indeed, all of these alleged similarities constitute
 5 unprotectible *scenes á faire* that flow naturally from the premise of a young student
 6 teacher. *See Funky Films*, 462 F.3d at 1081 (finding that similar plots involving “the
 7 family-run funeral home, the father’s death, and the return of the ‘prodigal son,’ who
 8 assists his brother in maintaining the family business” were unprotectible general plot
 9 ideas); *Kouf*, 16 F.3d at 1044-1045 (finding similar plots of shrunken kids and the
 10 “life struggle of kids fighting insurmountable dangers” unprotected general plot
 11 ideas); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (finding that
 12 “[e]lements such as drunks, prostitutes, vermin and derelict cars would appear in any
 13 realistic work about the work of policemen in the South Bronx” and “therefore are
 14 unprotectible as ‘scenes a faire,’ that is, scenes that necessarily result from the choice
 15 of a setting or situation”); *Crichton*, 84 F.3d at 589 (2d Cir. 1996) (finding automated
 16 tours, uniformed workers, dinosaur nurseries and electrified fences were all “classic
 17 *scenes a faire* that flow from the uncopyrightable concept of a dinosaur zoo”); *Wild*,
 18 788 F.Supp.2d at 1103 (finding that “the idea of a murder suspect or some other
 19 character being chased by an angry mob is so common as to require little comment”);
 20 *Zella*, 529 F.Supp.2d at 1135 (finding similarities of cooking, interviewing celebrities
 21 and discussing celebrity projects to be *scenes a faire* that naturally flow from an
 22 interview and talk-show format”); *Campbell*, 718 F.Supp.2d at 1112-1113 (finding
 23 that a young mentee-older mentor storyline was a “basic plot idea . . . not protected by
 24 copyright law” and the idea that the older mentor was a former champion racer
 25 “directly flows” from a story involving race-car driving); *Flynn v. Surnow*, 2003 WL
 26 23411877 at *8 (C.D. Cal., Dec. 9, 2003) (Fees, J.) (finding that use of a sniper rifle
 27 by an assassin was “an example of a *scene á faire* which flows naturally from a plot
 28 about an assassination attempt”); *Randolph v. Dimension Films*, 634 F.Supp.2d 779,

1 789 (S.D. Tex. 2009) (finding that a fight scene featuring powers and weapons was
 2 unprotectible because it flowed naturally from the general concept of an imaginary
 3 world controlled by character's mind or thoughts); *Harter v. Disney Enterprises, Inc.*,
 4 2012 WL 4324417 at *2-3 (E.D. Mo., Sept. 20, 2012) (after converting a Rule
 5 12(b)(6) motion to dismiss to a motion for summary judgment, the court ruled, based
 6 on the works alone, that defendants' movies about Santa's dog were not substantially
 7 similar to protected expression in plaintiff's story about Santa's dog even where
 8 plaintiff's and defendants' works all had a plot involving a threat to the Christmas
 9 holiday/spirit that was saved by a talking Christmas dog, all works featured characters
 10 of Santa, elves and other helpers, dogs named "Paws," "Santa Paws," or "Puppy
 11 Paws," an antagonist trying to ruin Christmas or cause other trouble, and a magical
 12 icicle or ice crystal).

13 Plaintiffs' Complaint makes no allegations regarding the extrinsic elements of
 14 themes, dialogue, mood, setting, pace, or sequence of events.

15 The Ninth Circuit's analysis in *Olson*, affirming JNOV for defendants'
 16 television series *The A-Team* against a claim brought on the plaintiff's script, applies
 17 equally here:

18 Olson claims, in essence, that the defendants took his
 19 characters and his format for an action-adventure series.
 20 However, copyright law affords no protection to the format
 21 proposed by Olson. Nor may we find copyright infringement
 22 based upon a comparison of the characters in "Cargo" to
 23 those in "The A-Team," both because the "Cargo" characters
 24 were drawn so thinly and because the characters of "The
 25 A-Team" differed in significant ways from those in "Cargo."

26 855 F.2d at 1483.

27 Because Plaintiffs' allegations are not plausibly suggestive of a claim entitling
 28 Plaintiffs to relief against Signer for copyright infringement, Plaintiffs' First Claim

1 against Signer should be dismissed.

2 **IV. PLAINTIFFS' FOURTH CLAIM FOR QUANTUM MERUIT SHOULD**
 3 **BE DISMISSED BECAUSE IT IS PREEMPTED BY THE COPYRIGHT**
 4 **ACT AND ALLEGES NO MISREPRESENTATION BY SIGNER**

5 In their Fourth Claim for quantum meruit, Plaintiffs reallege and incorporate all
 6 the prior allegations of their Complaint, including their allegations that defendants
 7 infringed the copyrights in Plaintiffs' Registered Works (Cmpt., ¶ 108), and then
 8 pleads, as "an alternative to the claims of copyright infringement in Counts I, II and
 9 III," a state law claim for quantum meruit. Cmpt., ¶ 109. Plaintiffs allege that "[a]s a
 10 result of Defendants' unauthorized use of Plaintiff's scripts without permission or
 11 compensation, Defendants have been unjustly enriched." Cmpt., ¶ 110. Plaintiffs'
 12 quantum meruit claim fails to allege any additional facts beyond those alleged in their
 13 copyright claim and does not include any element not included in that copyright claim
 14 other than the conclusory allegation that "Defendants obtained a benefit from Plaintiff
 15 *through misrepresentation* and the taking of an undue advantage." Cmpt., ¶ 111
 16 (emphasis added.) Plaintiffs fail to allege what the purported misrepresentation was
 17 or who purportedly made it.

18 That portion of the quantum meruit claim against Signer that relates to
 19 "Defendants' [alleged] unauthorized use of Plaintiffs' scripts without permission or
 20 compensation" and alleged unjust enrichment (Cmpt., ¶ 110) is preempted by the
 21 Copyright Act. Section 301(a) of Copyright Act states, in relevant part:

22 [A]ll legal or equitable rights that are equivalent to any of
 23 the exclusive rights within the general scope of copyright as
 24 specified by section 106 in works of authorship that are
 25 fixed in a tangible medium of expression and come within
 26 the subject matter of copyright as specified by sections 102
 27 and 103, whether created before or after that date and
 28 whether published or unpublished, are governed exclusively
 by this title. Thereafter, no person is entitled to any such
 right or equivalent right in any such work under the common
 law or statutes of any State.

17 U.S.C. §301(a).

1 A state law cause of action is preempted by the Copyright Act if: (1) the
 2 particular work to which the claim is being applied falls within the subject matter of
 3 works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the
 4 claim seeks to vindicate legal or equitable rights that are equivalent to one of the
 5 bundle of exclusive rights already protected by copyright law under 17 U.S.C. §106.
 6 *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998).

7 Regarding the first prong, works fall within the subject matter of the Copyright
 8 Act when they are “original works of authorship fixed in any tangible medium of
 9 expression” 17 U.S.C. § 102(a). “Works of authorship” are defined to include
 10 literary works, dramatic works, and motion pictures. *Id.* Derivative works also fall
 11 within the subject matter of copyright. 17 U.S.C. § 103(a).

12 The second prong of section 301(a) – equivalency of rights – is satisfied
 13 whenever the rights protected by state law are “equivalent” to the exclusive rights
 14 protected by the Copyright Act. Those rights include the rights “to reproduce the
 15 copyrighted work,” “to prepare derivative works based upon the copyrighted work,”
 16 “to distribute copies . . . of the copyrighted work to the public,” “to perform the
 17 copyrighted work publicly,” and “to display the copyrighted work publicly.” 17
 18 U.S.C. § 106. In order to avoid preemption, the state cause of action must protect
 19 rights which are qualitatively different from those rights. *Laws v. Sony Music*
 20 *Entertainment, Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006), *cert. denied*, 549 U.S. 1252,
 21 127 S.Ct. 1371, 167 L.Ed.2d 159 (2007). “The state claim must have an extra
 22 element which changes the nature of the action.” *Id.* (citing *Del Madera Properties*
 23 *v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 977 (9th Cir. 1987), *overruled on other*
 24 *grounds, Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455
 25 (1994). If the additional element does not transform the underlying nature of the
 26 action, the state law claim will be subject to preemption. *Laws*, 448 F.3d at 1144-
 27 1145.

1 Plaintiffs' Fourth Claim for quantum meruit is fully covered by both prongs of
 2 the two-part preemption test. As to the first prong, it is beyond dispute that Plaintiffs'
 3 *Student Teacher* pilot script and show bible and the *Mr. Young* television program fall
 4 within the "subject matter" of copyright under Section 102(a). As to the second
 5 prong, Plaintiffs' quantum meruit claim is based on Signer's alleged "unauthorized
 6 use of Plaintiff's scripts without permission or compensation" (Cmpt. ¶ 110) by
 7 allegedly "creating a derivative work of Tiar's pilot script, copying and/or creating
 8 derivative works of the episodes in the Registered Works and copying and/or creating
 9 derivative works of the characters in the Registered Works" (Cmpt., ¶ 91
 10 [incorporated into Plaintiffs' Fourth Claim for quantum meruit]) – *i.e.*, rights that are
 11 equivalent to the exclusive rights protected by the Copyright Act.

12 Accordingly, that portion of Plaintiffs' quantum meruit claim that is based on
 13 Signer's alleged use of Plaintiffs' *Student Teacher* pilot script and show bible is
 14 preempted by the Copyright Act. *Del Madera*, 820 F.2d at 977 (finding as preempted
 15 an unjust enrichment claim based on alleged use or copying of materials within the
 16 subject matter of copyright); 1 *Nimmer*, § 1.01[B][1][g], at 1-51 ("[A] state law cause
 17 of action for unjust enrichment or quasi contract should be regarded as an 'equivalent
 18 right' and hence, pre-empted insofar as it applies to copyright subject matter.")¹.

19
 20
 21 ¹ Other circuits also follow this mandate. *E.g.*, *Ehat v. Tanner*, 780 F.2d 876, 877-78
 22 & n. 2 (10th Cir. 1985), *cert. denied*, 479 U.S. 820, 107 S.Ct. 86, 93 L.Ed.2d 39
 23 (1986) (finding unjust enrichment claim alleging that the defendant profited from use
 24 of literary material preempted); *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d
 25 296, 306 (2d. Cir. 2004), *cert. denied*, 544 U.S. 949, 125 S.Ct. 1704, 161 L.Ed.2d 525
 26 (2005) ("Plaintiffs seek to protect their alleged interests in 'The Thin Red Line' under
 27 the theory that Phoenix was unjustly enriched by turning Jones' novel and Malick's
 28 screenplay into a motion picture without compensating Briarpatch or obtaining
 Briarpatch's permission. From this, it is clear that the specific right they are trying to
 enforce is the right of adaptation—*i.e.*, the right to prepare or authorize preparation of
 a derivative work based on a novel or screenplay. See 17 U.S.C. § 106(2).");
American Movie Classics Co. v. Turner Entertainment Co., 922 F.Supp. 926, 934
 (S.D.N.Y. 1996) ("preemption is appropriate because AMCC's unjust enrichment
 claim does not allege that defendants were enriched from anything other than their
 unauthorized exhibition of the copyrighted films—a claim which is equivalent to the
 exclusive right of public performance provided by the Copyright Act. Thus, the claim
 does not possess the 'extra element' required to avoid preemption."); *McArdle v.*
Mattel Inc., 456 F.Supp.2d 769, 779 (E.D. Tex. 2006) (finding unjust enrichment and

That portion of Plaintiffs' Fourth Claim for quantum meruit that is based on an alleged misrepresentation (Cmpt., ¶ 111) should be dismissed as to Signer because Plaintiffs have alleged no misrepresentation by Signer. *See* Cmpt., ¶¶ 131-38; Section V, *infra*. For the same reason, the conclusory misrepresentation allegation cannot serve as an extra element that would allow the Fourth Claim to avoid preemption.

The entirety of Plaintiffs' Fourth Claim for quantum meruit should therefore be dismissed as to Signer.

V. PLAINTIFFS' SEVENTH CLAIM FOR INTENTIONAL MISREPRESENTATION SHOULD BE DISMISSED AS TO SIGNER BECAUSE IT ALLEGES NO MISREPRESENTATION BY SIGNER

The elements of a claim for intentional misrepresentation are:

- (1) misrepresentation (false representation, concealment, or nondisclosure);
- (2) knowledge of falsity (scienter);
- (3) intent to defraud (*i.e.*, to induce reliance);
- (4) justifiable reliance;
- (5) resulting damage.

Anderson v. Deloitte & Touche, 56 Cal.App.4th 1468, 1474 (1997); California Civil Code §§ 1709, 1710.

In their Fourth Claim for intentional misrepresentation, Plaintiffs allege "that Weitz made at least the following representation to Tiar: that, in his opinion, Tiar's Registered Works could not be sold even if they were edited and/or adjusted." Cmpt., ¶ 131. Plaintiffs allege that this representation was false, that "Weitz made the decision that WME could market *Student Teacher* and collect higher commissions if it were marketed through a well-known producer, such as Signer," and that "[b]y marketing the materials through Signer, Weitz knew WME could sell the works for a

quantum meruit claims in action by children's book author against toy company preempted because "[u]njust enrichment and quantum meruit are equitable, quasi contractual claims that exist when there is no express agreement" and "[t]he Copyright Act generally preempts both claims").

1 higher price.” Cmpt, ¶ 133. Plaintiffs further allege that “at the time Weitz made
 2 these representations, he knew them to be false and made these representations with
 3 the intention to induce Tiar to act in reliance on these representations and stop
 4 pursuing production of his scripts.” Cmpt., ¶ 134. Nowhere do Plaintiffs allege *any*
 5 representation – much less misrepresentation – *by Signer*. Because Plaintiffs do not
 6 allege against Signer a key element of a claim for intentional misrepresentation, their
 7 Fourth Claim should be dismissed as to Signer.

8 **VI. PLAINTIFFS’ TENTH AND ELEVENTH CLAIMS AGAINST SIGNER**
 9 **FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF SHOULD**
 10 **BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE**
 11 **PLAUSIBLE CLAIMS FOR RELIEF**

12 As to Signer, Plaintiffs’ Tenth Claim for declaratory relief seeks a judicial
 13 determination of whether Signer committed copyright infringement by allegedly
 14 creating derivative works of Plaintiffs’ *Student Teacher* pilot script and show bible.
 15 Cmpt., ¶ 149 (a). Plaintiffs’ Eleventh Claim for injunctive relief and impoundment
 16 seeks to enjoin Signer’s alleged “wrongful conduct” and to impound all allegedly
 17 infringing materials. Cmpt., ¶¶ 153-155. Because Plaintiffs have failed to allege a
 18 plausible claim for relief against Signer for copyright infringement, Plaintiffs’
 19 declaratory and injunctive relief claims should be dismissed as to Signer.

20 **VII. CONCLUSION**

21 For all the foregoing reasons, Signer respectfully requests that Plaintiffs’
 22 Complaint be dismissed as to Signer in its entirety.

23 DATED: December 10, 2012

24 /s/
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